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CURRENT TOPICS.

The universal satisfaction which the appointment of Chief Justice Gray, of the Massachusetts Supreme Judicial Court, to fill the vacancy upon the Federal Supreme Bench occasioned by the death of Mr. Justice Clifford, has given to the bar and to the general public, is a vindication of the soundness of the principle which we have so strenuously advocated, that these nominations should be bestowed as the reward of honestly acquired judicial eminence, rather than as a tribute to political or even ordinary professional distinction. The career of Judge Gray has been emphatically judicial in its character, and this appointment comes as the not unworthy crowning result of a life of labor. He is about fifty-two years old, and has been upon the Massachusetts Supreme Bench since 1864, having filled the office of chief justice since 1873.

The trial of Guiteau continues to attract the attention of the public, both lay and professional. Last week the court, at the instance of the prosecution, ordered the removal of the prisoner to the dock from the position which he has heretofore occupied near his counsel, with a view of rendering him less noisy and more orderly if possible. This proceeding brought about some disclosures, which, it seems to us, would naturally have the effect of impressing the public and the lay press, if it were of an impressionable nature, with a sense of the utter lack of value of lay criticism of judicial proceedings. Unmeasured abuse has been heaped upon the head of Judge Cox, because of the latitude allowed the prisoner during the progress of the trial. The jurists of the newspapers abounded in suggestions as to the proper course under the circumstances. Much anxiety was expressed as to the view which would be taken of the matter by the press and the public abroad, as if, forsooth, the chief object of a murder trial in Washington was to convince our transatlantic cousins that we had emerged from barbarism and had attained enlightened views upon the subject of the administration of justice. So scandalized were these learned gentlemen, by the antics of the accused and the court's leniency, that it was even hinted occasionally that the impropriety of a lynching party in the early days of the prisoner's stay in jail would have been preferable to such a raree-show of a trial. When, however, the court passed the other day upon the motion of the prosecution to have the prisoner restrained, the statement was made that the extraordinary latitude which had been allowed to him had been in direct response to a request of the district attorney that he might be permitted to exhibit himself to the fullest extent to the jury and to the experts who would attend in the court-room for the purpose of studying his appearance and conduct, and thus enable them to form a better opinion of the condition of his mind.

At the meeting of the Missouri Bar Association, held in this city on the 27th ult., a paper was read by Jay L. Torrey, Esq., of this bar, entitled The Judicial System of Missouri, which contained some suggestions upon the subject of judicial reform which are worthy of attention. The plan advocated for the relief of the plethora of the Supreme Court's docket, involves a system of intermediate appellate courts (which shall be entirely independent of the circuit bench, and thus placed beyond the danger of becoming a mutual admiration society of circuit judges, as was complained of the old district courts), and a pecuniary limit upon the right of appeal. This limit constitutes the gist of his suggestions. He argues that the objection that is usually made to a provision limiting the right of appeal to cases involving not less than a certain amount, on the ground that it tends to make the higher courts tribunals for the rich, and excludes the poor from the benefits of the best judicial talent, is illusory; that the greatest need of the impoverished litigant is an end of contention, and that the most effective weapon of the powerful and oppressive litigant is the ability to prolong the contest indefinitely by means of unmeritorious appeals.

Another suggestion contained in this paper which we do not remember to have seen expressed elsewhere is, that the true way to render an appellate tribunal attractive to the more eminent minds among the profession, and to give to its incumbents fair opportunities for complete development, is to relieve it of the necessity of trying insignificant cases of no merit and of but little interest, in consequence of the principles involved, and thus enable it to devote its time and attention to the careful elucidation of the cases of real importance which come before it. This object, he thinks, will, in a measure, be accomplished by the establishment of the pecuniary limit to the right of appeal.

INSANITY—BURDEN OF PROOF.

The defense interposed in the Guiteau case has served to direct attention to the law of insanity in criminal cases, to an extent hitherto unknown. The acquittal of Sickles in the District of Columbia, and of Cole, and of McFarland in New York, served to create a public sentiment which has been constantly growing, and which, looking upon the defense of insanity as a "dodge," demands that the law shall be strictly construed, and so rigid a rule laid down as shall make it impossible that such a defense should be successful, unless the prisoner was unquestionably insane. The danger is, that in laying down the rule so rigidly, the actually insane may be unjustly convicted. Such a result is to be avoided, unless we are prepared to act upon the theory advanced by some, that a murderer should be executed whether he be sane or insane.[1] We do not believe that such a theory will find favor to any extent. "Without reference to sentiment or ideas of duty," as an eminent gentleman recently said, "or to any philosophical reasoning whatever, it is practically impossible for a civilized nation to deliberately and consistently inflict the highest punishment of responsible crime on irresponsible lunatics, or to shoot them down as wild bulls running through the streets; for to do this we must ourselves first become rebarbarized; the weapon of our defense would burst in our hands—we should destroy our civilization in the very effort to save it."[2] If, then, in the interest of justice and civilization, the extreme penalty of the law is not to be visited upon the insane criminal, several questions of great interest arise: What shall be done with him? What shall be the test of responsibility? Shall the burden of proof of insanity rest upon him, or upon the prosecution? It is to the last of these inquiries that we direct attention. Upon this question, as is well known, different theories prevail, and we propose to present the rulings upon the subject in the courts of the several States, for the purpose of ascertaining just how the matter stands at the present time.

I. The first theory to be noticed is that which holds that the burden of proof rests in such cases upon the prisoner. And this theory is the one adopted in the following States:

In Alabama it was recognized in 1850, in McAllister v. State,[3] and in 1880, in Boswell v. State,[4] it was reaffirmed after careful argument and exhaustive consideration. In this last case insanity is said to be "a defense which must be proved to the satisfaction of the jury by that measure of proof which is required in civil causes, and a reasonable doubt of sanity raised by all the evidence does not authorize an acquittal."

In Arkansas it was adopted in 1870, in McKenzie v. State,[5] where the question is briefly considered, and the opinion expressed that the prisoner must produce evidneec sufficient to change the presumption of his sanity. No authorities are cited by the court.

In California this doctrine was adopted in 1862, in People v. Myers,[6] where the court declared that the prisoner must establish his defense of insanity, and that he must establish it by a preponderance of evidence, not merely by raising a doubt in the minds of the jury. This doctrine has been reaffirmed in a number of cases, the last of which was decided in September, 1881.[7]

[1] This view is advocated by Dr. Elwell, a distinguished writer on Medical Jurisprudence in the *North American Review*, for January, 1882.

[2] Ibid. Dr. George M. Beard's article.
[3] 17 Ala. 436.
[4] 63 Ala. 307.
[5] 26 Ark. 334, 341.
[6] 20 Cal. 518.
[7] People v. Coffman, 24 Cal. 233; People v. McDonnell, 47 Cal. 134; People v. Wilson, 49 Cal. 14; People v. Wreden, 12 Reporter, 682.

In Connecticut the subject was briefly considered in State v. Hoyt,[8] decided in 1878. No authorities were cited for or against the conclusion reached. The subject was thus summarily disposed of: "The accused introduced a witness, an expert, upon the point of insanity, and the court permitted an expert to testify upon the same subject in behalf of the State by way of rebuttal. The accused complains of this, and urges that the State should have introduced this evidence in chief. The complaint is without foundation. The law presumes every person of mature years to be of sound mind and competent to commit crime. If the defense be insanity, it is to be proved substantially as an independent fact, and the burden of proof is on the accused. Upon this issue he goes forward and the State rebuts."

In Delaware the matter has been under consideration in a number of cases, and the same conclusion reached in all. The prisoner is bound to prove his insanity, and must prove it beyond a reasonable doubt.[9]

In Georgia the subject was considered in 1872. The jury had been charged that the defense of insanity must have been proven to their satisfaction, or they were bound to discredit it. The Supreme Court said, in reference to this instruction: "*Prima facie*, all persons are to be considered sane; and this is true in criminal as well as civil trials. If this be the legal presumption, it would seem to follow that unless the jury are satisfied of insanity, they must consider the prisoner sane. Perhaps the word satisfied is rather strong; and were there any evidence here of insanity, we might hesitate to sustain the judge."[10]

In Iowa the question was settled in State v. Felter,[11] decided in 1871, in which the court held that insanity was an affirmative defense, and that the prisoner must make it appear by a preponderance of evidence. An instruction was sustained which informed the jury that it was unnecessary that they should be satisfied beyond all reasonable doubt, and that it was sufficient to justify an acquittal that they were reasonably satisfied, upon a consideration of the whole testimony, of the prisoner's insanity.

In Kentucky, too, the burden of proof is on the prisoner. It is there held, however, to be insufficient that the evidence merely raises a doubt as to the prisoner's mental soundness, for the reason that this would be repelling a legal presumption by evidence raising a mere doubt or suspicion as to the mental condition. In such a case the legal presumption would amount to little, if to anything at all.[12]

In Maine the question underwent very careful examination in State v. Lawrence,[13] decided in 1870, and the opinion of the court is among the ablest of those holding the burden to be upon the prisoner, and is well worthy of great consideration. "It is undoubtedly true," said the court, "that there can be no guilt except as the result of the action of a sound mind, there can be no crime except there be a criminal; nevertheless there is a palpable distinction between these two; one can not exist without the other, still they are two and not one and the same. The person doing the act is not the act itself. He may or may not be responsible for the act; but in no sense can he be the act." The court goes on to say that the defense of insanity is a plea of confession and avoidance. It does not meet any question propounded by the indictment, but raises one outside of it. It is not a denial, but a positive allegation, and the prisoner assumes the affirmative, changing the issue. The presumption of sanity continues until removed by a preponderance of the evidence. "Does it not," asks the court, "and must it not necessarily still stand, though we may have some doubts of its truth? That which exists is not destroyed simply because it may be enveloped in a thin cloud. However we may theorize, it will still exist until demolished. If this presumption is to be overthrown by a doubt, as well might it be abolished at once."

In Massachusetts Chief Justice Shaw declared in the noted case of Commonwealth v. Rogers, decided in 1844, that, in order to shield a prisoner from criminal responsibility, the presumption of his sanity must be rebutted by proof of the contrary satisfactory to

[8] 46 Conn. 330, 337.

[9] State v. Danby, 1 Houston (Cr. Cas.), 175; State v. Pratt, 1 Houston (Cr. Cas.), 269; State v. Boice, Ibid. 355; State v. Draper, Ibid. 531; State v. Thomas, Ibid. 511.

[10] Holsenbake v. State, 45 Ga. 55.

[11] 32 Iowa, 50.

[12] Kriel v. Commonwealth, 5 Bush, 362; Graham v. Commonwealth, 16 B. Mon. 587; Smith v. Commonwealth, 1 Duvall, 224.

[13] 57 Me. 574.

the jury.[14] And he added that if a preponderance of evidence was in favor of insanity, the jury would be authorized to acquit the prisoner. Again, in 1856, in Commonwealth v. Eddy,[15] the court declared that the burden of proof was on the State to prove the sanity of defendant, but that the burden was sustained by the presumption of law that all men are sane, until it was rebutted and overcome by satisfactory evidence to the contrary. And this doctrine has since been adhered to.[16]

In Minnesota it was settled as early as 1858, that the burden of proof as to insanity rested on the prisoner.[17] The New York case of People v. McCann,[18] holding a contrary doctrine, was said to be controverted by the weight of authority, and was expressly repudiated as not being the safer and better rule. This doctrine is still followed.[19]

In Missouri this subject has been considered in a number of cases, in all of which it is agreed that it rests on the prisoner to prove his insanity. The question was considered as early as 1848, when the court sustained the following instruction: "This defense is emphatically one which the defendant must make out to the satisfaction of your minds. For if the evidence merely shows a case of doubt where the defendant might or might not be insane, this is not sufficient to authorize an acquittal. * * * * The evidence must show satisfactorily to your minds that he was insane at the time of the commission of the act."[20] This was afterwards adhered to in State v. Huting,[21] decided in 1855, when the court held that a prisoner was not entitled to the benefit of a reasonable doubt as to his sanity. But in 1868, in State v. Klinger,[22] while the doctrine was sustained that the burden rested on the prisoner, the court receded from its former position, that it was necessary that the defense of insanity should be made out beyond a reasonable doubt, and held it to be sufficient if made out by a preponderance of the evidence, and to the rensonable satisfaction of the jury. And in 1873 this doctrine was affirmed in State v. Smith,[23] and again in 1880, in State v. Redemeier,[24] Henry, J., dissenting. The majority of the court in the case last cited were of the opinion that the wisdom of the rule was demonstrated by the ease with which insanity could be simulated, and that it was necessary for the protection of society.

In New Jersey it was held in State v. Spencer,[25] decided in 1846, that where the evidence left the question of insanity in doubt, the jury must find against the prisoner, for the reason that every man was to be presumed sane until the contrary was clearly proven. "When the evidence," so it was said, "of sanity on the one side, and of insanity on the other, leaves the scale in equal balance, or so nearly poised that the jury have a reasonable doubt of his insanity, then a man is to be considered sane and responsible for what he does. But if the probability of his being insane at the time is, from the evidence in the case, very strong, and there is but a slight doubt of it, then the jury would have a right, and ought to say, that the evidence of his insanity was clear. The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be, in order to find a sane man guilty."

In North Carolina the matter was considered and summarily disposed of in Morehead v. Brown,[26] where it was held that the prisoner was to be considered sane until the contrary was proven. And it was said that he is "not required to show the matter of excuse beyond a reasonable doubt; but must offer such testimony as will satisfy the jury that his defense is established. He must prove his case as you would require the proof of any fact about which parties are at issue. Reasonable doubt, in the humanity of our law, is exercised for a prisoner's sake, that he may be acquitted if his case will allow it. It is never applied for his condemnation."

And in Ohio the question was raised and settled in 1843, in Clark v. State.[27] In that case it was determined that the burden was

14 7 Metcalf, 500.
15 7 Gray, 583.
16 Commonwealth v. Heath, 11 Gray, 303.
17 Bonfanti v. State, 2 Minn. 123.
18 15 How. Pr. 503.
19 State v. Gut, 13 Minn. 341.
20 Baldwin v. State, 12 Mo. 223.
21 21 Mo. 464.
22 43 Mo. 127.
23 53 Mo. 267.
24 71 Mo. ——.
25 1 Zabriskie, 201.
26 6 Jones L. 366.
27 12 Ohio, 483.

with the prisoner to show, to the satisfaction of the jury, the perverted condition of his mind. The court declared that it would be unsafe to let loose upon society great offenders upon mere theory, hypothesis, or conjecture. "A rule that would produce such a result would endanger the community, by creating a means of escape from criminal justice, which the artful and experienced would not fail to embrace." It was said not to be sufficient if the proof barely shows that an insane state of mind was possible, or even shows it to have been probable. In 1857 the question was again argued, and the court held that it was sufficient if the prisoner established the fact of insanity by a preponderance of the evidence.[28] This has been followed in subsequent cases in the same court, the last having been decided in 1876.[29] In that case the court took occasion to say that it considered the question as having been settled by its prior decisions, but that, if the question could be considered as an open one, the majority of the court would be in favor of the rule as already laid down.

In Pennsylvania this subject received very careful attention in Ortwein v. Commonwealth,[30] which was decided as recently as 1874, the opinion being delivered by Chief Justice Agnew. "Soundness of mind is the natural and normal condition of men, and is necessarily presumed, not only because the fact is generally so, but because a contrary presumption would be fatal to the interests of society. No one can justly claim irresponsibility for his act contrary to the known nature of the race of which he is one. He must be treated and be adjudged to be a reasonable being, until a fact so abnormal as a want of reason positively appears. * * * * The evidence of insanity must be satisfactory and not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature." The court declared that any different conclusion than the one announced would fill the land with acquitted criminals. Since that case was determined, the subject has been brought before the court in four different cases, in 1874, 1876, 1878 and 1879.[31] In each of these cases the court affirmed its former ruling, and declared that while the burden was on the prisoner, it was not necessary that proof of his insanity should be absolutely conclusive, but that it might be established by "satisfactory and fairly preponderating evidence.

In Tennessee the burden of proof is on the prisoner, but when the proof of insanity makes an equipoise, the presumption of sanity is neutralized and ceases to weigh, and the jury are in reasonable doubt, and should acquit.[32] As to the argument that the safety of society required that a criminal should prove his insanity beyond a reasonable doubt, the court said: "We find the law well-settled, that when the State charges a citizen with crime, his guilt must be established beyond a reasonable doubt. We apply this rule to the worst men about whose sanity no doubt is raised, and turn them loose to repeat their crimes, because they are entitled to the human doctrine of doubts. With what show of reason or humanity could we reverse the rule as to that unfortunate class of citizens whose memory and discretion is found to be of doubtful soundness, and subject them to imprisonment for life?"

So in Texas it was said in 1854: "Insanity is an exception to the general rule; and before any man can claim the benefit of the exception, he must prove that he is within it."[33] In a more recent case, decided in 1880, the Court of Appeals declared that the prisoner's insanity must be made to appear to the satisfaction of the jury trying him.[34] Until this is made clearly to appear, he is to be presumed to have a sufficient degree of reason to be responsible for his acts.

In Virginia the Court of Appeals in 1871 considered this whole subject, the matter being elaborately reviewed, and it was decided that the prisoner must prove the fact of his insanity to the satisfaction of the jury.[35] The argument of public safety is again advanced. "Insanity is easily feigned," said

[28] Loeffner v. State, 10 Ohio St., 598.
[29] Bond v. State, 23 Ohio St. 349; Bergin v. State, 31 Ohio St. 115.
[30] 76 Pa. St. 423.
[31] Lynch v. Commonwealth, 77 Pa. St. 205; Meyers v. Commonwealth, 83 Pa. St, 141; Pannell v. Commonwealth, 86 Pa. St. 268; Sayres v. Commonwealth, 88 Pa. St. 301.
[32] Dove v. State, 3 Heisk. 348 (1872).
[33] Carter v. State, 12 Tex. 500.
[34] Clark v. State, 8 Tex. Ct. of App. 350.
[35] Boswell's Case, 20 Grattan, 860.

the court, "and hard to be disproved, and public safety requires that it should not be established by less than satisfactory evidence. Some of the cases have gone so far as to place the presumption of sanity on the same ground with the presumption of innocence, and to require the same degree of evidence to repel it. But I do not think it is necessary or proper to go to that extent."

II. The second theory is that the burden of proof rests upon the State. It must be conceded that the cases which maintain this theory do so in the face of an overwhelming weight of authority. The courts of Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Texas and Virginia, present a most formidable array of authorities against this theory. For while some few of them hold that the prisoner must establish his insanity beyond a doubt, and the others that a preponderance of the evidence is sufficient, they are all agreed that the burden rests with him and not with the State. It will be found, however, that the contrary theory has found favor with some of our ablest and most enlightened courts.

In Illinois, in Fisher's Case,[36] decided in 1859, the first of these theories was adopted, and the burden was held to be on the prisoner. But in 1863 this case was overruled and declared to have been decided under peculiar circumstances, not admitting of much deliberation. The presumption of innocence is pronounced to be as strong as the presumption of sanity, and it is said that the jury must acquit if they have a well-founded doubt of the prisoner's sanity. "The human mind revolts at the idea of executing a person whose guilt is not proved, a well-founded doubt of his sanity being entertained by the jury." [37] The matter came up again in 1866, when the court explained the preceding case and declared that it deemed sanity as essential an ingredient in crime as the overt act. "We wish to be understood as saying that the burden of proof is on the prosecution to prove guilt beyond a reasonable doubt, whatever the defense may be. If insanity is relied on, and evidence given tending to establish that unfortunate condition of mind, and a reasonable well founded doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demand that the accused shall have the benefit of the doubt." [38]

In Indiana in 1862 it was held to be the duty of the jury to acquit if a reasonable doubt of sanity was entertained.[39] In 1869 the question arose again, and a similar ruling was obtained.[40] In 1879 the subject was again presented to the attention of the court. It was declared unnecessary that the evidence should preponderate in favor of insanity. A reasonable doubt was sufficient for an acquittal. If the prisoner raises a reasonable doubt as to his sanity, it is necessary that the State should prove mental soundness beyond a reasonable doubt.[41]

In Kansas the same theory is maintained with ability. In 1873 the Supreme Court of that State declared that the fact of soundness of mind was as much an essential ingredient of the crime of murder as was the fact of killing, or malice, or any other fact or ingredient of murder. "It ought to be made out," said the court, "in the same way, by the same party, and by evidence of the same kind and degree, and as conclusive in its character, as is required in making out any other essential fact, ingredient, or element of murder." [42]

In Michigan a similar view is taken of this question, and it is conceded that the judiciary of this State is second to none of our State tribunals. The question was very fully considered in People v. Garbutt,[43] the opinion being delivered by Chief Justice Cooley. In speaking of the cases holding the burden of proof to be upon the prisoner, it was said that they "overlook or disregard an important and necessary ingredient in the crime of murder; and they strip the defendant of that presumption of innocence which the humanity of the law casts over him, and which attends him from the initiation of the proceedings until the verdict is rendered." After showing that the crime of murder is only committed when

[36] 23 Ill. 293.
[37] Hopps v. People, 31 Ill. 385.
[38] Chase v. People, 40 Ill. 352.
[39] Polk v. State, 19 Ind. 170.
[40] Stevens v. People, 31 Ind. 485.
[41] Gueting v. State, 66 Ind. 94.
[42] State v. Crawford, 11 Kan. 32.
[43] 17 Mich. 9.

a person of sound mind and discretion unlawfully killed another with malice, express or implied, it is declared that the prosecution takes upon itself the burden of establishing not only the killing, but the malicious intent. "There is no such thing in law as a separation of the ingredients of the offense so as to leave a part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical, and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent." [44]

In Mississippi this doctrine is also maintained, and with marked ability. The subject was considered in 1879, and it was said: "There can be no crime without mental accountability, and it is just as essential to show the conscious mind as the unlawful act. But it is said that the law presumes sanity. So the law presumes malice from the fact of killing; but if anything in the testimony, either of the State or of the defendant, suggests a reasonable doubt of its existence, nobody ever supposed that the State could stop short of removing this doubt, and of establishing this malice to a moral certainty." The court declares that it fails to see any consistency or logic in holding that the State must establish all the elements of the crime beyond a reasonable doubt, with the exception of the prisoner's sanity, which may be assumed on less satisfactory proof. "How can a jury say," asks the court: "We have no doubt of the guilt of the prisoner, but we do doubt whether he was sane? If a jury in a capital case should bring in such a verdict, would it not be judicial murder to inflict a sentence of death?" [45]

In Nebraska the same question came up in 1876, and a similar conclusion was arrived at.[46]

In New Hampshire, also, this view is taken of the question. It was thus settled in 1861, in State v. Bartlett, [47] and the conflict in the adjudged cases was declared to be due to an unjustifiable attempt to apply to criminal causes the rules which govern the trial of issues in civil causes. To shift the burden of proving insanity from the State to the prisoner, is pronounced as being "utterly at war with the humane principle which, in *favorem vitæ*, requires the guilt of a prisoner to be established beyond a reasonable doubt." In 1870 this doctrine was affirmed in State v. Jones. [48]

In New York it must be considered as doubtful which of these theories is to be recognized. People v. McCann, [49] has been very generally cited as establishing the principle that the burden of proof rested with the State, but later cases involve the question in great uncertainty.

The rulings which the court will no doubt be asked to make in the Guiteau case as to the burden of proof, and as to the test of responsibility when insanity is interposed as a defense, are awaited with great interest. The questions will no doubt be ably presented to the court, and the admirable bearing of the trial judge, and the impartial manner in which he has held the scales of justice even, give every reason to hope that the very solemn questions involved will not be in any way prejudiced by detestation of the prisoner, nor by outside clamor demanding his execution.

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[44] See People v. Finley, 38 Mich. 482.
[45] Cunningham v. State, 56 Miss. 272.
[46] Wright v. People, 4 Neb. 408.
[47] 43 N. H. 224.
[48] 50 N. H. 369, 400.
[49] 16 N. Y. 58.

EVIDENCE BY PRISONERS--GUITEAU'S TRIAL.

Many things connected with Guiteau's wearisome trial astonish, and even shock, an English reader. Not the least strange aspect of it is the latest. Guiteau himself has given evidence in court. His own counsel called him as a witness to prove the defense of insanity. He was questioned by Mr. Scoville as to the chief events of his life from infancy, his connection with the Onedia community, his founding a newspaper, his income, his religious beliefs, his experience as a lecturer, his hunt after a public office, and

his mental state before he shot the President. He was then cross-examined at great length by Judge Porter, the counsel for the prosecution, with a view to show that he was feigning insanity, or that, if he were insane, his malady was only vanity in excess. All this is highly repugnant to English practices and notions of fair play. In every criminal case here the accused is incompetent to give evidence. He can not be called by the prosecution, and if he tender evidence, it will not be accepted. So fastidious are we as to a prisoner's interests that when he is before the magistrates, and has heard the charge against him, he is told that he need not say anything; and he is warned that if he does say anything it will be taken down, and may be used against him. At his actual trial he is positively disqualified—to his disadvantage if innocent, and greatly and unfairly to his advantage if he be guilty—from giving evidence. Of course, he may, and often does, make a statement of which the jury takes account. But it is not given with the accompaniment of an oath; and his remarks are not subject to cross-examination. The practice was not always exactly what it is. The records of the State trials show that prisoners were frequently questioned roughly by the judge, and were subjected even to searching and protracted cross-examination from the bench. But this fell long ago into disuse, and it came to be recognized that an accused person was in all respects an incompetent witness. Even in civil disputes the parties to the record were once thought to be incompetent. They were supposed to be too much interested in the result to be trusted to speak the truth. While this was the recognized rule—and it lasted almost intact until the passing of Lord Brougham's Act in 1851—it was out of the question to admit the competency of the prisoner as a witness. The same principles were adopted in the United States. But legislation has there made certain changes in the common law, and in some States—Missouri, for example—the prisoner does not hold the same favorable position as in England. In 1878, Congress introduced an important innovation where it had criminal jurisdiction; for it declared "that in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, in the United States Courts, territorial courts and courts martial, and courts of inquiry, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." It is under this statute, we presume, that the examination and cross-examination of Guiteau, so antagonistic to our ideas, proceeded.

Those who have advocated an alteration of our law with a view to allow prisoners to testify, probably did not foresee such a case as this. They had in view prisoners whose defense turned on questions of material facts. They did not consider the consequences if a prisoner who was, or affected to be, insane, were placed in the witness-box, and were to be free there to vent his ravings at any length. That has happened at Washington. Guiteau is permitted to rant about anything. It can not well be otherwise. It would be hardly consistent to restrain him. He may insult the court and call anybody bad names. He may talk about Mr. Beecher, Mr. Tilton, St. Paul, or his views about inspiration; yet he can not be consistently silenced. The contention of his counsel is that he is insane. He must be allowed to prove this by all legitimate means; and every piece of irrelevancy which Guiteau utters in court is in point, according to this theory, as showing that his mind is unhinged. The contest between him and Mr. Porter has been anything but pleasant. The latter has sought to elicit from him answers which go to prove that, in spite of his vagaries, he is conscious of the distinction between right and wrong—in other words, that, even if insane in the view of medical experts, he is not according to any legal text. There has been a constant struggle, unpleasant, whatever be Guiteau's mental condition, to draw something from him which betrayed the fact that he retained a sense of right and wrong, and so might rightly be convicted of murder. The duel was continued yesterday, Mr. Porter trying to extract admissions, and the prisoner insisting that he was inspired, and declining to answer questions which he disliked. This trial is the first conspicuous example of the working of a system which it

has been proposed to introduce into this country. It is not encouraging. It will be often hereafter cited as proof that we ought to be content with what we have. But the whole trial, it ought to be remembered, is exceptional. It may be a century before a criminal of the morbid vanity and volubility of Guiteau is again brought to trial. It is to be hoped that in most courts of justice here proceedings would be conducted without the animated irregularity which has characterized the trial at Washington from first to last. The question of insanity is always obscure, and involves minute investigations, when experts are called in, and intelligence is alleged to coexist with the absence of free volition. Matters are complicated when the prisoner, as here, asserts that he is sane, and his counsel contends that he is mad. And it must not be assumed that the investigation has been unprecedentedly long. It has, indeed, lasted from the 14th of last month. But the trial at New York of Huntington for forgery, in which the plea of insanity was set up, and in which the prisoner was not examined, extended over a whole month.

On the whole, we may safely come to a conclusion as to the expediency of admitting prisoners to testify without attaching much consequence to the incidents of this extraordinary trial. We can not help seeing that the tendency is in favor of permitting this course. In more than one recent Act—for instance, the Merchant Shipping Act of 1876, the Mines Regulation Act, and the Conspiracy and Protection of Property Act of 1875—the legislature has broken in upon the common law, and has allowed the defendant to give evidence as an ordinary witness. People are more skeptical than they were as to the advantages of the present system. It is not so clear as it seemed to be that justice should have so heavy odds against it in its contest with the murderer or thief. The rational rule seems to be that everything should come out; and in the end this is likely to obtain acceptance. It is almost a daily occurrence that men get verdicts of acquittal when, if one or two questions had been put to them, the hollowness of their defenses would have been revealed. A jury acquits a prisoner under the belief that he has never been convicted. They are then informed that he has been in prison half-a-dozen times for the same offense. They feel that they have been duped. Their verdict would have been otherwise had they been trusted and the whole facts laid before them. With our traditions, it might not be expedient to allow the judge, as in France, to question the accused; that would depose the former from his position of impartiality. But it is probable that we should, on the whole, gain, were the accused free to go into the box. In many instances guilty prisoners would be deprived of a false, artificial advantage. Even in controversies as to sanity, it would be, as a rule, better that the defendant should be examined in presence of the jury. A few answers from him would tell more than the conflicting testimony of crowds of experts, all sworn to some theory; more than citations, torn from their context, of medical writers, or loose anecdotes about the imbecility of the prisoner's ancestors. At any rate, the incidents of Guiteau's trial ought not to prejudice our decision in regard to an important question. His boisterous vanity would have insured scenes at his trial under any system.—*London Times.*

CONTRACTS — DISTINCTION BETWEEN COVENANT AND CONDITION.

HALE v. FINCH.

Supreme Court of the United States, October Term, 1881.

1. One not a party to an action, nor notified of its pendency, having no opportunity or right to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error from the judgment therein, is not bound by such judgment.

2. Certain language in a bill of sale construed to be a condition, not a covenant.

3. Neither express words of covenant, nor any particular words, nor any special form of words, are necessary in order to charge a party with covenant. Sometimes words of proviso and condition, or even recitals, will be construed into words of covenant, such being the apparent intention and meaning of the parties.

4. Covenant will not arise unless it can be collected from the whole instrument that there was an agreement, or promise, or engagement, upon the part of the person sought to be charged for the performance or non-performance of some act.

In error to the Supreme Court of the Territory of Washington.

On the first day of May, 1864, the Oregon Steam Navigation Company, then engaged in the transportation, for hire, of freight and passengers on

the Columbia River and its tributaries, purchased a steamboat, called the New World, from the California Steam Navigation Company, then engaged in like business upon the rivers, bays and waters of the State of California.

The terms of the sale are embodied in a written agreement, from which it appears that the consideration was $75,000, and the covenant and agreement of the vendees, not only that they would not "run or employ, or suffer to be run or employed, the said steamboat New World upon any of the routes of travel upon the rivers, bays and waters of the State of California for the period of ten years from the first day of May, 1864," but that its machinery should not be "run or employed in running any steamboat, vessel or craft upon any of the routes of travel, or on the rivers, bays or waters of" that State for that period. The Oregon Steam Navigation Company, in that agreement, further stipulated, that in case of any breach of their covenant and agreement, they would pay the California Steam Navigation Company the sum of $75,000 in gold coin of the United States 'as actual liquidated damages,'—such stipulation, however, not to have the effect to prevent the latter from taking such other remedy, by injunction or otherwise, as they might be advised.

On the 18th of February, 1867, the Oregon Steam Navigation Company sold the New World to Henry Winsor, Clanrick Crosby, N. Crosby, Jr., and Calvin H. Hale, executing to Winsor a bill of sale, which stated the consideration to be $75,000. That instrument, after setting out the covenant of the vendors to warrant and defend the steamboat and all its appurtenances against all persons whomsoever, recited that "it was understood and agreed' that the sale was "upon the express condition" that the steamboat should not run, nor its machinery be used in running, any other steamboat, vessel or craft, within ten years from the 1st day of May, 1867, on any of the routes of travel on the rivers, bays or waters of the State of California, or on the Columbia River and its tributaries.

At the time of the making of that bill of sale, Winsor and his associates, with L. D. Howe and A. R. Elder as their sureties, executed an additional writing, similar in all respects to that before mentioned as having been executed by the Oregon Steam Navigation Company on the 1st of May, 1864, except that Winsor and his associates, in the paper by them signed, covenanted and agreed that the New World should not, for the period of ten years from May 1st, 1867, be run, or suffered to be run or employed, nor its machinery used in any other steamboat, on the rivers, bays or waters of the State of California, or on the Columbia River and its tributaries.

On the 5th of March, 1867, Winsor executed to Hale a bill of sale of the New World, reciting a consideration of $75,000, and by the terms of which, the former for himself, his heirs, executors and administrators, promised, covenanted and agreed to and with Hale, to warrant and defend the title to the steamboat, her boilers, engines, machinery, tackle, apparel, etc.

On the 23d of November, 1867, Hale executed to Finch, the defendant in error, a bill of sale, reciting a consideration of $50,000, and containing, among others, the following clauses:

"And I, the said Calvin H. Hale, have, and by these presents do promise, covenant and agree, for myself, my heirs, executors and administrators, to and with the said Duncan B. Finch, his heirs, executors, administrators and assigns, to warrant and defend the whole of said steamboat New World, her engines, boilers, machinery, and all the other before-mentioned appurtenances, against all and every person and persons whomsoever.

"And it is understood and agreed that this sale is upon this express condition, that said steamboat or vessel is not, within ten years from the first day of May, 1867, to be run upon any of the routes of travel on the rivers, bays or waters of the State of California, or the Columbia River or its tributaries, and that during the same period last aforesaid the machinery of said steamboat shall not be run, or be employed in running, any steamboat or vessel or craft upon any of the routes of travel on the rivers, bays or waters of the State of California, or the Columbia River and its tributaries."

At the same time a separate written agreement was entered into between Finch and Hale, from which it appears that the former, in terms, covenanted and agreed to do various things which have no connection with this case, and need not, therefore, be here specified. It is only important to observe, as to that separate agreement, that it did not embrace any covenant or agreement whatever on the part of Finch against the use of the steamboat New World, or of its machinery, upon the waters of California, or upon the Columbia River or its tributaries.

The present action was brought against Finch by Hale and those associated with him in the purchase from the Oregon Steam Navigation Company.

The complaint avers:

That, in all said transactions, Winsor, defendant knew, represented his co-plaintiffs as well as himself.

That defendant, in violation of his promise and agreement, made at the time he purchased the steamboat, caused, suffered and permitted the same to be taken to San Francisco, on or about the 1st day of October, 1868, and, from that date up to May 1st, 1874, caused, suffered and permitted it to be run upon the routes of travel on the rivers, bays and waters of California;

That on October 5, 1869, the Oregon Steam Navigation Company sued the plaintiffs and their sureties, Howe and Elder, to recover the sum of $75,000, fixed as liquidated damages for the breach of the covenants and agreements contained in the within memorandum of Feb. 18, 1867,—the ground of said action being that the defendants therein

had run the steamboat New World, or suffered and permitted it to be run, on the rivers, bays and waters of California, after November 1st, 1868, and prior to May 1st, 1874, which acts, it is averred, are the same now complained of as constituting a breach of the defendant's alleged agreement of November 23, 1867 (20 Wall. 64); and,

That, in said action, the Oregon Steam Navigation Company recovered a judgment against the present plaintiffs for $75,000, which sum, with $4,000 expended in defending the suit, they had been compelled to pay.

Judgment is now asked against Finch for $79,000 in damages, for the violation of his alleged agreement and promise.

The answer puts in issue all the material allegations of the complaint, except the fact that the steamboat, subsequent to the purchase by Finch, was used upon the waters of the State of California during the period charged.

The defendant, in addition, pleads: 1. That the agreement was void under the statute of frauds and perjuries of the Territory, in that it was not, and is not, to be performed in one year from the making thereof; and was not, nor was any note or memorandum thereof, in writing, signed by defendant, according to the provisions of the statute. 2. That the steamboat was taken to California, and run upon the waters and bays of that State, by the leave and license of the plaintiff, given to the defendant on the 1st day of July, 1868. 3. That the action is barred by the limitations of three and six years, prescribed by the statute of the Territory.

There was a verdict for the defendant, in obedience to a peremptory instruction by the court, and the judgment rendered thereon was affirmed by the Supreme Court of the Territory. From that judgment of affirmance this writ of error is prosecuted.

Mr. Justice HARLAN delivered the opinion of the court:

Upon the filing in the Supreme Court of the Territory, of the judgment and mandate of this court, in Oregon Steam Navigation Co. v. Winsor (20 Wall. 64), that cause was remitted to the court of original jurisdiction, for further proceedings according to law. The defendants therein obtained leave to withdraw, and did withdraw, their answers. Judgment by default was thereupon entered against them for the sum of $75,000, the amount fixed as actual liquidated damages, with interest and costs. Satisfaction thereof was entered at the same term of the court. That judgment, it is contended by the present defendant, was obtained by collusion between the parties to that action. It is further claimed that it has never, in fact, been satisfied. Whether these charges are true, we need not here inquire. And it is scarcely necessary to say that that judgment is not conclusive of the rights of the present defendant. He was not a party to that action, nor notified of its pendency. He had no opportunity or right, in that case, to controvert the claim of the Oregon Steam Navigation Co., to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment. Railroad Co. v. Nat. Bank, 102 U. S. 211. Besides, that case was founded upon the written covenant and agreement of Winsor and his associates with the Oregon Steam Navigation Company, while the liability of Finch to the plaintiffs in this action depends altogether upon the construction which may be given to the bill of sale executed to him by Hale. If the record of the case of the Oregon Steam Navigation Co. v. Winsor, etc., is competent evidence in this action, for any purpose, it can only be to show the amount of damages which Winsor and his associates have sustained, by reason of the New World being run on the waters of California, after Finch became owner.

But, the liability of those parties for such damages arose out of the covenant and agreement which they made with the Oregon Steam Navigation Company. With that transaction, however, Finch had no connection, and unless he made a similar covenant and agreement with those from whom he purchased,—thereby becoming interested in keeping the covenant and agreement made with that company by Winsor and his associates—he can not be affected by the judgment obtained against the latter.

This brings us to the main contention on behalf of plaintiffs in error, viz., that the language of the bill of sale from Hale to Finch, if interpreted in the light of all the circumstances attending its execution, imports a covenant upon the part of the latter, that he would not use or permit the use by others, of the steamboat or its machinery, within a prescribed period, either upon the waters, rivers and bays of California, or upon the Columbia River and its tributaries. If, however, the language, properly interpreted, imports only a condition, for breach of which the vendor had no remedy other than by suit to recover the property sold, then it is, as indeed it must be, conceded, that the judgment below was right.

We are of opinion that the latter construction is the proper one.

If we look both at the circumstances preceding, and at those immediately attending, the purchase by Finch, and if we impute to him full knowledge of everything that occurred, as well when the Oregon Steam Navigation Company made its original purchase, as when it subsequently sold to Winsor and his associates—all which counsel for plaintiffs contends we are bound, by the settled rules of law, to do,—what do we find?

The written memorandum between that company and the California Steam Navigation Company, in words aptly chosen, shows, as we have seen, an express covenant and agreement, upon the part of the former, that the New World, nor its machinery, shall be used on the waters of California within ten years from May 1, 1864, and, also, to pay a certain sum, as actual liquidated damages, for any breach of such covenant and

agreement. The bill of sale from the Oregon Steam Navigation Company to Winsor and his associates did not contain any words of covenant or agreement. But the company, in view of its express covenants to the California Steam Navigation Company, took care to exact from its vendees a separate written obligation, in which the latter, in express terms, covenanted and agreed with that company, in like manner as the latter had covenanted and agreed with the California Steam Navigation Company. The next writing executed was the bill of sale from Winsor to Hale. That instrument shows nothing more than a covenant to warrant the title to the steamboat. It makes no reference, in any form, to any waters from which the steamboat should be excluded. Then comes the bill of sale executed by Hale to Finch. Its material portions are the same in substance, and, in language, almost identical with the bill of sale given by the Oregon Steam Navigation Company to Winsor. Each contains a covenant and agreement, upon the part of the vendor, simply to warrant and defend the title to the steamboat, its machinery, etc., against all persons whomsoever. But each recites, let it be observed, only an agreement that the sale is upon the express condition that it shall not be used or employed upon those waters. Upon the sale by the Oregon Steam Navigation Company to Winsor and his associates, the former, as we have seen, was careful to take the separate obligation of the latter, with surety, containing covenants and agreements, described in such terms as to show that the draughtsman, as well as all parties, knew the difference between a covenant and a condition. The same criticism may be made in reference to the separate writing signed by Finch and Hale, at the time of the execution by the latter of the bill of sale to the former. The latter writing shows, it is true, several covenants and agreements upon the part of Finch, but no covenant or agreement in reference to the use of the boat, such as found in the writings which passed between the California Steam Navigation and the Oregon Steam Navigation, or such as are contained in the separate agreement between the latter and Winsor and his associates.

If, therefore, we suppose (which we could not do without discrediting some of the testimony) that Finch, at the time of his purchase, had knowledge of all the papers executed upon prior sales of the New World, the absence, as well from the bill of sale accepted by him, as from the written agreement of the same date, signed by him and Hale, of any covenant or agreement that he would not use that vessel, or permit it to be used, on the prohibited waters within the period prescribed, quite conclusively shows that he never intended to assume the personal responsibility which would result from such a covenant.

It thus appears that the circumstances separately considered, militate against the construction for which plaintiff contends.

But, if we omit all consideration of the circumstances under which the bill of sale from Hale to Finch was executed, and look solely at the language employed in that instrument, there seems to be no ground upon which the claim of plaintiff can stand. The words are precise and unambiguous. No room is left for construction. It is undoubtedly true, as argued by counsel, that neither express words of covenant, nor any particular technical words, nor any special form of words, are necessary in order to charge a party with covenant. 1 Roll. Abridg., 518; 1 Burr. 290; 1 Vesey, 516; Sheppard's Touchstone, 161, 162; Courtnay v. Taylor, 7 Scott, N. R. 765; 2 Parsons' Contracts, 510. "The law," says Bacon, "does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant." Bacon's Abridgment, Covenant, A. So, in Sheppard's Touchstone, 161-2, it is said: "There need not be any formal words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in whatsoever words it be set down, for anything to be or not to be done, the party to or with whom the promise or agreement is made may have his action upon the breach of the agreement." "Sometimes," says Mr. Parsons, "words of proviso and condition will be construed into words of covenant when such is the apparent intention and meaning of the parties." 2 Parsons' Cont. 510-11. There are also cases in the books in which it has been held that even a recital in a deed may amount to a covenant. Farrall v. Hilditch, 5 C. B. N. S. 852; Great Northern R. W. Co. v. Harrison, 12 C. B. 609; Severn v. Clark, 1 Leon, 122. And there are cases in which the instrument to be construed was held to contain both a condition and a covenant; as, "if a man by indenture letteth lands for years, provided always, and it is covenanted and agreed, between the said parties, that the lessee should not alien." It was adjudged that this was "a condition by force of the proviso, and a covenant by force of the other words." Coke Litt. 203 b.

But according to the authorities, including some of those above cited, and from the reason and sense of the thing, a covenant will not arise unless it can be collected from the whole instrument that there was an agreement, or promise, or engagement, upon the part of the person sought to be charged, for the performance or non-performance of some act. Comyns, in his Digest (Covenant, A 2), says that "any words in a deed which show an agreement to do a thing, make a covenant." "But," says the same author, "where words do not amount to an agreement, covenant does not lie; as, if they are merely conditional to defeat the estate; as, a lease, provided and upon condition that the lessee collect and pay the rents of his other houses." Comyns' Dig., Covenant, A 3. The language last quoted is found also in Platt's Treatise on the Law of Covenants. Law Library, vol. 3, p. 17. It there appears in con-

nection with his reference to the case where A leased to B for years, on condition that he should acquit the lessor of ordinary and extraordinary charges, and should keep and leave the houses at the end of the term in as good plight as he found them." In such case, the author remarks, the lessee was held liable to an action for omitting to leave the houses in good plight, "for here an agreement was implied."

Applying these doctrines to the case before us, its solution is not difficult. Without stopping to consider whether a covenant upon the part of Finch could arise out of a bill of sale which he did not sign, but merely accepted from his vendor (Platt on Covenants, chap. 1), it is sufficient to say that that instrument contains no agreement or engagement or promise by him that he would or would not do anything. There is, in terms, a covenant by Hale to Finch to defend the title to the boat and its machinery against all persons whomsoever. This is immediately followed by language implying an agreement, not that Finch would not use, or permit others to use, the boat and its machinery upon the prohibited waters within the period limited, but only an agreement that the *sale* was upon the *express condition* that neither the boat nor its machinery should be so used. It is the case of a bare, naked condition, unaccompanied by words implying an agreement, engagement, or promise by the vendee that he would personally perform, or become personally responsible for the performance of, the express condition upon which the sale was made. The vendee took the property subject to the right which the law reserved to the vendor, of recovering it upon breach of the condition prescribed. The vendee was willing, as the words in their natural and ordinary sense indicate, to risk the loss of the steamboat when such breach occurred, but not to incur the personal liability which would attach to a covenant or agreement upon his part, that he would not use, and should not permit others to use, the boat or its machinery upon the waters and within the period named. If this be not so, then every condition in a deed or other instrument, however bald that instrument might be of language implying an agreement, could be turned, by mere construction and against the apparent intention of the parties, into a covenant or agreement involving personal responsibility. The vendor having expressly, and the vendee impliedly, agreed that the sale was upon an express condition—stated in such form as to preclude the idea of personal responsibility on the part of the vendee—we should give effect to their intention, thus distinctly declared.

This conclusion disposes of the case, and relieves us of the necessity of considering other questions of an interesting nature which counsel have discussed.

Judgment affirmed.

WEIGHT OF EVIDENCE — NEGLIGENCE—DUTIES OF PERSONS CROSSING RAILROAD TRACK.

TUCKER v. DUNCAN.

United States Circuit Court, Southern District of Mississippi, November Term, 1881.

1. Railroad employees are as worthy of belief as other agents. All agents and employees are presumed to be friendly to their employer, and on that account are usually subjected to a rigid cross-examination; but when this is done, their evidence must be weighed as other testimony, and its value estimated in connection with all the facts proven.

2. When the injuries complained of are the result of inevitable accident, no compensation can be allowed.

3. It is the duty of one desiring to cross a railroad to use his powers of hearing and of vision to ascertain whether or not there is likely to be an approaching train, and if so, to stop until the danger is past. If there is no obstruction to either the sound or vision, then the passer need not stop, but must use both these faculties; if there is such obstruction, then it is his duty to stop and both look and listen; and if he neglects to use these precautions and a collision takes place, compensation can not be given, unless it was caused by the gross negligence or wrongful conduct of the employees conducting the railroad operations.

Humphries & Sykes and *Wiley P. Harris*, for petitioner; *E. L. Russell*, *Peter Hamilton*, *J. M. Allen* and *L. Brame*, for defendant.

HILL, J., delivered the opinion of the court:

This is a complaint made by the said Tucker, in which he alleges that, on the 11th day of October, 1880, he was with his wagon drawn by one horse, crossing the Columbus branch of the Mobile & Ohio Railroad, on St. John street, in the City of Columbus, when, without any carelessness or default upon his part, but by the carelessness and improper conduct alone of the employees operating the engine and train of said receiver, upon said railroad, his wagon was run against and thrown over, and by means of which he was thrown from his wagon and received sundry dangerous and severe wounds, endangering his life greatly; disfiguring him and causing him great bodily pain, and for which he claims $25,000 damages as compensation. To the complaint the defendant answers, that the injuries complained of were caused by the carelessness and reckless conduct of the petitioner alone, and not by the carelessness or want of skill or misconduct upon the part of his employees, as alleged in the petition. Upon the issue thus made, a large volume of evidence has been taken and submitted to the court, and upon which exhaustive comment has been made by the distinguished counsel on both sides, all of which has been carefully considered with the sole view of arriving at a correct conclusion as to whether or not, under the testimony and rules of law applicable to it, the petitioner is entitled to compensation, and if so, for

what sum? The proofs show the following indisputable facts.

The point at which the accident occurred is at the crossing of St. John street over the railroad in charge of the defendant as receiver, under the appointment of the court, and in the city of Columbus; that the crossing is a dargerous one for those passing on this street going south, from the fact that it is near the depot, and near the side track used for switching off cars and making up trains, and over which point locomotives and trains necessarily have to pass many times during the day; the danger is further increased from the fact that there is a brick warehouse situated east of the street and north of the railroad, and extending 250 feet from near the track of the road north on the street, and 240 feet east of the street, and being some 17 feet high, obstructs the view from those passing south on the street; the danger is still further increased by the narrowness of the street near the crossing, being only fifteen or sixteen feet wide, with a deep and wide ditch or wash-out on the west side; the street is also covered with gravel which causes a noise when vehicles pass over it. The depot, side track and switches used by the railroad are situate east of and near this crossing, and that in making up trains the locomotives must necessarsly pass this crossing; that the time for the departure of the evening train was forty minutes after three, P. M., and that the practice was to commence making up the train an hour or more before the train time, and that at the time of the occurrence complained of, the locomotive was employed in making up ihe evening train, being about three o'clock, P. M. It is also an indisputable fact that petitioner was driving a spring wagon loaded with rails, and drawn by one horse, coming down St. John street, going south; that when near the crossing, and at a place where the street was too narrow to turn around, the locomotive approached the crossing, the horse became frightened and stopped for a moment, when petitioner urged him on with the purpose of passing in front of the locomotive; that the fore wheels of the wagon passed the end of the pilot of the engine, but that the hind wheels, or one of them, was caught on or struck the end of the pilot which threw the wagon on its side; the horse being frightened sprang forward and disengaged himself from the wagon; the petitioner was thrown forward upon the street and was thereby greatly wounded, injured and disfigured, causing him great pain and suffering, and which injuries may prove permanent. There was not then, and never had been, any sign board erected at that point warning passers of approaching trains, nor any other warnings or signals given other than the ringing of the bell or blowing of the whistle. These are all of the disputed facts that need be stated. There are others, and upon which the questions submitted must greatly depend, about which there is more or less conflict between the witnesses of petitioner and defendant.

The conductor of the train, the engineer who was operating the engine, the brakeman who was then employed in changing the switch or throw rail, the fireman then engaged on the locomotive and whose business it was to ring the bell, also another witness—all testify that at the time the collision took place, and before, whilst the locomotive was in motion, the bell was ringing. It is also in proof that soon after the accident the petitioner stated that the bell was ringing. The petitioner has introduced the testimony of a number of witnesses, stating that they were near enough to have heard the bell if it had been ringing; some speak in more positive terms that it was not rung; and others that, if it was, that they did not hear it. Other witnesses state that it was the general practice to ring the bell when the engine was in motion, but that it was sometimes omitted; some witnesses stating that the omission was frequent, and others that it was not. It is also in proof that accidents have occurred at this crossing before, or were barely escaped. It was the duty of the conductor and of the engineer to see that the bell was rung, and it is to be presumed that the brakeman would also observe this duty; it was also the duty of the fireman to ring it. All these swear positively that it was rung.

The testimony on the other side is, with one or two exceptions, of a negative character, and those stating most positively do not state reasons for remembering that they were listening, and that the bell was not ringing, and then the declaration of the petitioner himself to his physician when attending to his wound immediately after the accident, explaining how it occurred—that the bell did ring—in my judgment gives a decided preponderance in favor of the proposition that the bell was rung. I can not assent to the position that the employees of a railroad are less worthy of belief than other agents. All agents and employees are presumed to be friendly to their employer, and on that account are usually subjected to a rigid cross-examination: but when this is done, their evidence must be weighed as other testimony, and its value estimated in connection with all the facts proven.

It is contended by petitioner's counsel that no weight should be given to petitioner's declaration made in the presence of the engineer, as testified to by him, as to the ringing of the bell, because of the want of credibility of the witness, the unreasonableness of his statement, and the suffering condition of the petitioner. I am of opinion that the statement of the witness is not unreasonable; he was but a short distance from him, and immediately sprang to him, and most probably made the inquiry before he was aware of the extent of the injury, and the answer was made when the facts were present before the mind of the petitioner.

The most satisfactory conclusions as to the real occurrences immediately preceding and at the time of the collision, are to be drawn from the

statement made in evidence by the petitioner himself, and his declaration made soon after to Dr. Vaughn and the physical facts attending it, as shown by the evidence and uncontroverted. The petitioner in his deposition, in reply to the question as to how the injury complained of was occasioned, made the following answer: "As I got near the railroad crossing, my horse became very much frightened at seeing the locomotive approaching, and I pulled the reins to stop him, but he was so excited I failed, or could not stop him; I said 'whoa' to him twice; he did not stop at all; the engine was then immediately in front of him; I then became wonderfully excited myself to see how I could escape myself; the street was too narrow, I could not turn around; I saw the horse was determined to go forward, and, believing it was the only chance to save my life was to let him go, I slackened the rein, and he darted violently forward; the cow-catcher. to the best of my knowledge, struck the wagon at the hind wheels, and threw me twelve or fifteen feet forward on the street; I was knocked senseless, and do not know anything more about the particulars."

Dr. Vaughn testifies, "that soon after the collision he was called to dress the petitioner's wounds, when he asked petitioner as to the manner of their infliction; he replied that he had been run over by a locomotive at the crossing at St. John street and thrown into the ditch near by; that the rear of the wagon had been struck by the locomotive; that, hearing the bell and the locomotive coming, he tried to stop his horse; that the more he pulled, the faster the horse went; finding that he could not stop him, he tried to cross the track by driving him up, with the result as stated."

James Sykes testifies, "that after the accident petitioner stated to him that he was driving his wagon not thinking of the engine or cars until he approached near the corner of the warehouse; that he heard no bell, is what I think he said, or, as I now recollect, he said he heard no noise; that the engine came suddenly by, or came in sight, or view of his horse, who became very much frightened, and he gave him a cut with a whip to make him jump across the road ahead of the engine, which he thought was his only safety."

The undisputed physical facts are, that the horse and fore wheels of the wagon had passed in front of the engine before any collision took place, and that either the end of the pilot ran into the hind wheels of the wagon, or that by a sudden turn of the wagon to the left, the hind wheels of the wagon ran upon the end of the pilot. From the rapidity with which the wagon must have been moving and the slow motion of the engine at the time, I am of the opinion that the wagon ran on the pilot. The testimony of the engineer is, that when he saw the petitioner, he reversed the engine and put on the steam to stop it; he was scarcely moving the engine when the collision took place. This statement is sustained from the fact that the horse and fore wheels of the wagon passed in front of the engine before the collision took place, which could not have been done, had the engine been moving at any but the slowest speed.

This is a sufficient statement of the facts as shown from the proof, with this addition, that the petitioner was well acquainted with the danger of the crossing, and the time of the making up and leaving of the trains. There is little difference of opinion as to the rules of law properly applicable to the facts as stated. See Railroad Company v. Houston, 95 U. S. 697; Tilfer v. Railroad Company, 1 Brown (N. J.), 188.

The petitioner, to entitle himself to compensation, must show, first, that the collision occurred without any negligence, carelessness, or wrongful act on his part; and, secondly, that it was the result of the carelessness, negligence, or some wrongful act upon the part of the employees of the defendant, or of the defendant himself. If it was from inevitable accident brought about by the unmanageable conduct of the horse, or otherwise not attributable to the defendant or his employees, then no compensation can be allowed.

These rules are so plain and so well understood, that reference to the authorities to sustain them is unnecessary.

When a crossing is dangerous, the duty is imposed upon those engaged in conducting the engine and trains upon the road, and also upon those desiring to make the crossing, to use every reasonable precaution to avoid a collision; and the necessity is increased in proportion to the danger. This duty is required equally of both parties. It is the duty of those conducting the train to give a signal by having the bell rung, or blowing the whistle, when approaching a crossing, to warn passers of the approach of the engine or train, and to look and ascertain whether or not any one is about to cross the track in front of the locomotive, and, if so, to slacken up the speed, and, if need be, and if in the power of those in charge of the train, to stop the train, in order to avoid a collision. See Continental Improvement Co. v. Stead, 95 U. S. 161.

This is the duty on one side, and upon the other it is the duty of those desiring to make the crossing to use their powers of hearing and of vision to ascertain whether or not there is likely to be a passing locomotive or train, and if so, to stop until the danger is past. If there is no obstruction to either the sound or vision, then the passer need not stop, but must use both these faculties; but if there is such obstruction, then it is his duty to stop and both look and listen; and if he neglects to use these precautions, and a collision takes place, compensation cannot be given, unless it was caused by gross negligence or wrongful conduct of the employees conducting the railroad operations, the general rule being that, if the injured party contributes to bringing about the injury, he can not recover, although the employees may not be wholly blameless.

The petitioner knew the dangerous condition of

the crossing; that the warehouse formed an obstruction to the sight and sound of the locomotive coming from the east, and also knew, or had reason to know, that it was the time for making up the train; it was therefore his duty, before attempting to cross the track,to both look and listen for the approach of the locomotive and, if need be, to stop for that purpose. See Pennsylvania Railroad Co. v. Beale, 73 Pa. St. 504; Alyn v. Boston Railroad Co., 105 Mass. 77.

According to the admission of the petitioner, this he neglected to do until his horse was frightened by the approach of the locomotive. Had the horse not become frightened,he was a sufficient distance from the locomotive to have stopped him and waited for it to pass or get out of the way. Whether the fright of the petitioner caused him not to control his horse, or that the horse could not be controlled, the fact is that it was not done, and he urged him forward before the engine with the hope of escape, and the collision ensued. This calamity to the petitloner is certainly very much to be regretted, both on his account and those dependent upon him, but one which is difficult from the evidence to attribute to the defendant or his employees. See New Orleans, etc. R. Co. v. Mitchell, 52 Miss. 808. The proof is that the horse was unusually gentle and used to crossing at that point; yet the proof is equally clear that on this occasion he became frightened without more than usual cause.

Certainly this could not be apprehended by the engineer; he had a right to presume that the petitioner would stop until the danger was past, and could not reasonably suppose that the petitioner would run the hazard of attempting to cross in front of the locomotive. The testimony of the engineer, supported by the physical facts referred to, show that the engine was nearly at a standstill when the collision took place. The engineer could have done nothing more than he did. A careful consideration of the testimony satisfies me that the petitioner did not exercise the caution demanded of him; and that this cause, and his own alarm and reckless attempt to pass in front of the engine, with the fright and action of the horse, caused the collision, without fault npon the part of the defendant, or of his employees, wherefore, under the rules stated, compensation must be refused.

TRUST —DEPOSIT IN TRUST, IN SAVINGS BANK—TITLE DOES NOT PASS TO BENEFICIARY.

SMITH v. SPEER.

New Jercey Court of Errors and Appeals.

In 1874, a depositor in a savings bank, Rachel Speer, ordered the following entry to be made in her account: "Frank B. Smith, hatter, Danbury, Conn., son of Joseph Smith and Cornelia; to be drawn by Rachel; after death, by Frank." In 1870, she directed the following entry to be made in her pass-book in another savings bank: "This account is in trust for Frank B. Smith," and signed it with her name. She kept both pass-books in her own possession, and drew the dividends and part of the deposits down to 1878, when she became insane. Complainant is her nephew, and understood that, although the funds were deposited in trust for him, he was to have no part thereof until Rachel's death. *Held*, that he had no claim to be protected during Rachel's lifetime, against her or her guardian drawing the funds.

Bill for relief. On re-hearing.

S. Kalisch, for complainant; *W. B. Guild, Jun.*, for defendants.

THE CHANCELLOR delivered the opinion of the court:

This cause comes before me on the rehearing of a final decree advised by Vice-Chancellor Dodd. The decree is adverse to the complainant. The bill is filed to protect the claim which the complainant makes as *cestui que trust* to certain moneys deposited by Rachel Speer (formerly Rachel Wharry) in two savings banks: one, the Howard Savings Institution, of Newark, and the other, the Provident Institution for Savings, of Jersey City. In 1860, Mrs. Speer, then Mrs. Wharry, opened the account in the latter institution. She married her present husband in 1862. In 1868 she opened the account in the Howard Institution. Between 1870 and 1874 she ordered that the following entry be made in her account in the Provident Institution, and it was made accordingly: "Frank B. Smith, hatter, Danbury, Conn., son of Joseph Smith and Cornelia; to be drawn by Rachel; after death, by Frank."

In 1870 or 1871, she caused the following entry to be made in her account in her pass-book of the Howard Institution: "This account is in trust for Frank B. Smith," and signed it with her name. She kept the pass-books of both accounts in her own possession, and drew the dividends up to 1878, when she became insane, and she has ever since continued to be so. In that year she was duly declared to be of unsound mind, and her husband was duly appointed her guardian. The complainant is her nephew. He claims that, by the entries above mentioned, she declared a trust in his favor of the moneys in the two institutions, and that he is entitled to protection against her guardian, who claims the right to draw the money. It appears from the testimony that, though Mrs. Speer told the complainant that she had had all her money "put in trust" for him, both he and she understood that he was not to have any of it until after her death. Both accounts were in her name. By the entry in the book of the Provident Institution, she declared no trust, but, retaining for herself the unlimited power to draw, authorized him to draw after her death. Though by the entry in the pass-book of the Howard Institution she declared that the account was in trust for him, she still kept

the account in her own name, as she did that in the other institution. She not only kept both pass-books in her own hands, but drew money from both institutions upon them, up to the time when she lost her reason. The money was all her own. She never parted with the legal title to either fund. Without the production of the pass-book, no money could, according to their rules, be drawn from either institution. It is clear that she did not intend to part with her complete and absolute control over, and right to use and dispose of, the funds in question. Her design in making the entries evidently was to make a disposition of a merely testamentary character. The complainant has no claim to the interference of this court in the premises, and the advice of the vice-chancellor was therefore correct.

NOTE.—A gift to an infant may be supported, if accompanied by delivery of the chattel. Hunter v. Westbrook, 2 C. & P. 578; Granigan v. Arden, 10 Johns. 292; Snow v. Copley, 3 La. Ann. 610; Pierson v. Heisey, 19 Iowa, 114; Stell v. McKnight, 1 Bay, 64. See Hudnal v. Wilder, 4 McCord, 294; Trowell v. Carraway, 10 Heisk. 104; Roberts' Appeal, 85 Pa. St. 84; Hillebrant v. Brewer, 6 Tex. 45; Mahoney v. McCready, 15 Lower Can. 274. Also, Jones v. Lock, L. R. 1 Ch. App. 25; Faning v. Russell, 94 Ill. 386; Richardson v. Lowry, 67 Mo. 411; Brewer v. Harvy, 72 N. C. 176; Carpenter v. Davis, 71 Ill. 395; Zimmerman v. Streeper, 75 Pa. St. 147; Mason v. Hyde, 41 Vt. 232. And the law will accept it for the infant, if to its advantage. De Levillian v. Evans, 39 Cal. 120; Darland v. Taylor, 52 Iowa, 503; Howard v. Copely, 10 La. Ann. 504; Goss v. Singleton, 2 Head, 67. See Barnebe v. Suaer, 18 La. Ann. 148; Marston v. Marston, 21 N. H.491.

The parent can not afterwards reclaim it. Smith v. Smith, 7 C. & P. 401; Kellogg v. Adams, 51 Wis. 138; Long v. Long, 16 Grant's Ch. 239; 17 Id. 251. See Crany v. Kroger, 22 Ill. 74; Taplin v. Wilson, 4 Hun. 244; Wigle v. Wigle, 5 Watts, 522; Hunter v. Jones, 6 Rand. 541. Nor his creditors. Wambald v. Vick, 50 Wis. 456; Allen v. Knowlton, 47 Vt. 512; Mathes v. Dobschuetz, 72 Ill. 438. See Shirley v. Long, 6 Rand. 764.

Acts of ownership afterwards exercised by a parent over a gift to his minor child, do not invalidate or affect it. Dodd v. McCraw, 8 Ark. 83; Sewall v. Glidden, 1 Ala. 53; Ector v. Ector, 29 Ga. 443; Whitford v. Horn, 18 Kan. 455; Martrick v. Linfield, 21 Pick. 325; Hasbrouck v. Bouton, 41 How. Pr. 208; Kellogg v. Adams, 51 Wis. 138; Fowler v. Lockwood, 3 Redf. 465; Pierson v. Heisey, 19 Iowa, 114; Mortimer v. Brumfield, 3 Munf. 122; Coppage v. Barnett, 34 Miss. 621. See Thorpe v. Owen, 5 Beav. 224; Durrett v. Sewall, 2 Ala. 669; Wheeler v. Wheeler, 43 Conn. 503; Hitch v. Davis, 3 Md. Ch. 266; Cook v. Husted, 12 Johns. 188.

There may be a valid gift of a chattel, reserving to the donor its use for life. Davis v. Ney, 125 Mass. 590; Hope v. Hutchins, 9 Gill & Johns. 77; Conner v. Hull, 36 Miss. 424; Duncan v. Self, 1 Murph. 466; Howell v. Howell, 7 Ired. 491; McGinney v. Wallace, 3 Hill (S. C.), 254; Gadsden v. Whaley. 14 S. C. 210; McKane v. Bonner, 1 Bail. 113. See, however, Lance v. Lance, 5 Jones, 413; Withers v. Weaver, 10 Pa. St. 391; Pitts v. Mangum, 2 Bail. 588; Caldwell v. Wilson, 2 Spears, 75; Durham v. Dunkley, 6 Rand. 135; Anderson v. Thompson, 11 Leigh, 439.

A bank deposit receipt, *semble*, may not be transferred as a gift by mere delivery and indorsement. Moore v. Ulster Bank, L. R. (11 Irish C. L.) 512; Dunne v. Boyd, L. R. (8 Irish Eq.) 609; Gerow's Case, 5 Allen (N. B.), 512; Hill v. Sheibley, 64 Ga. 529; Withers v. Weaver, 10 Pa. St. 391; Hassell v. Basket (Ind.), 18 Alb. L. J. 323; Mead v. Mead (Eng.), 22 Alb. L. J. 359; McCabe v. Robertson, 18 U. C., C. P. 471. But see Amis v. Witt, 33 Beav. 619; 1 B. & S. 109; McGrath v. Reynolds, 116 Mass. 566; Brooks v. Brooks, 12 S. C. 422; Westerlo v. De Witt, 36 N. Y. 340.

A special deposit of bank bills, sealed in an envelope, was made by A, payable to himself or order, and he afterwards indorsed the certificate of deposit to B: *Held*, that B could hold the deposit against A's assignee in insolvency. Phillips v. Franciscus, 52 Mo. 370. See Young v. Young, 80 N. Y. 422; Welch v. Belleville Bank, 94 Ill. 191; Wyble v. McPheters, 52 Ind. 393; Southerland v. Southerland, 5 Bush, 591.

Where securities are sealed up, and indorsed with the intended beneficiaries' names, locked in a box, and the key retained by the donor, the gift is imperfect. Bunn v. Markham, 7 Taunt. 224; Coleman v. Parker, 114 Mass. 30; Trough's Estate, 75 Pa. St. 115; Merriwether v. Morrison (Ky.), 10 Reporter, 661; Bryson v. Browrig, 9 Ves. 1. See Hatch v. Atkinson, 56 Me. 324; Ellis v. Secor, 31 Mich. 185; Cooper v. Burr, 45 Barb. 9; Jones v. Selby, Prec. in Ch. 300; Stevens v. Stevens, 5 T. & C. (N. Y.) 87; Fowler v. Lockwood, 3 Redf. 465; Jones v. Brown, 34 N. H. 439, 445; Powell v. Hellicar, 26 Beav. 261; Walsh v. Sexton, 55 Barb. 251: Carradine v. Carradine, 58 Miss. 286.

As to the effect of a deposit in the joint names of the depositor and another person, George v. Bank of England, 7 Price, 646; Ward's Case, 2 Redf. 251; Orphan Asylum v. Strain, 2 Bradf. 34; Condon v. Bank of B., Ms., Stevens' Dig., N. B. 665. See Mack v. Mack, 5 T. & C. 528; Marshal v. Crutwell, L. R. (20 Eq.) 328.

A deposit in a savings bank of the depositor's money for the benefit of A, the depositor retaining the control of the fund during his lifetime, and A, having no notice thereof, has been held not to constitute a trust which A could always enforce. Brabrook v. Boston Bank, 104 Mass. 228; Clark v. Clark, 108 Mass. 522; Powers v. Provident Inst., 124 Mass. 377; Stone v. Bishop, 4 Clif. 593; Weber v. Weber (N. Y.), 9 Reporter, 632; Geary v. Page, 9 Bosw. 290; Meigs v.

Meigs, 15 Hun, 453. *Contra*, Witzell v. Chapin, 3 Bradf. 386. See Gaskell v. Gaskell, 2 You. & Jer. 502; Moore v. Moore, L. R. (18 Eq.) 474.

But the rule is otherwise if the depositor inform A of the deposit, and that A is to have it after the depositor's death. Gerrish v. New Bedford Inst., 128 Mass. 159; Gardner v. Merrit, 32 Md. 78; Ray v. Simmons, 11 R. I. 266; 15 Am. Law Reg. (N. S.) 701, and note; 23 Am. Rep. 447, and note; Vandenberg v. Palmer, 4 K. & J. 204. Although there may have been no delivery of the bank book. Blasdell v. Locke, 52 N. H. 238.

If A make a deposit in a third person's name, in order to avoid an attachment of the fund, and without an intention to donate it to a third person, he may afterwards recover it from the bank. Broderick v. Waltham Bank, 109 Mass. 149.

A made a deposit of her money in the name of B, and it was so entered in the books of the bank. A retained the book until her death, and there was no proof that B ever knew of the gift during her lifetime, she having died before A. *Held*, that the gift was perfect, and that the money belonged to B's estate. Howard v. Windham Bank, 40 Vt. 597.

A deposited $250 in a savings bank in her own name as trustee for W., a lad who did errands for A, and A informed W's parents of the deposit. A kept the book, and afterwards drew out all the deposit, together with the interest, appropriating it to her own use. At her death, she left a will, not mentioning the deposit, and not giving anything to W. *Held*, that the gift was complete at the time of the deposit, and that A could not subsequently revoke it. Minot v. Rogers, 40 Conn. 512; also, Thompson v. Gordon, 3 Strobh. 196; Trowell v. Carraway, 10 Heisk. 104; Marston v. Marston, 21 N. H. 491; Adams v. Nicholas, 1 Miles, 90; 2 Whart. 17; Huntington v. Gilmore, 14 Barb. 243; Jones v. Selby, Prec. in Ch. 300; Merchant v. Merchant, 2 Bradf. 432; Parker v. Ricks, 8 Jones, 447; Hambroke v. Simmons, 4 Russ. 25.

A deposited $460 in a savings bank for E K, her niece, and it was entered on the books of the bank "E K—M K, guardian," and A informed the guardian thereof. The book was delivered to A, who retained it, and afterwards had the money transferred to her by M K. *Held*, a complete gift, and beyond revocation. Kerrigan v. Rautigan, 43 Conn. 17.

A deposit in trust for C has been held to raise a presumption that it was the money of C. Millspaugh v. Putnam, 16 Abb. Pr. 380.

Where D deposited money in the name of "D, for C," and took a note therefor payable "D, for C,"—*Held*, that C could recover the amount after D's death. Smith v. Lee, 2 T. & C. (N. Y.) 591.

A deposited a sum to the credit and in the name of his son G, and, shortly before his death, gave a box to C, stating that it contained his bank-book, and that he intended it for G, but he retained the key of the box until his death.—*Held*, that G could recover. Vandermark v. Vandermark, 55 How. Pr. 408.

S deposited $500, "in trust for C," and afterwards drew out the interest herself. After S's death, the bank paid the amount to her administrator.—*Held*, that the title to the deposit vested in C at the time it was made, and that the subsequent payment to S's administrator was no defense to C's action for the fund. Boone v. Citizens Bank, 21 Hun, 235; also, Martin v. Funk, 75 N. Y. 134; Hunter v. Wallace, 14 U. C., Q. B. 205.

A deposit was made subject to the order of the depositor or his daughter. On the death of the depositor, the daughter claimed that he had given her the bank-book and the money credited therein, to be held in trust by her for herself and her brothers and sisters. *Held*, that the administrator was entitled to it, and not the daughter. Murray v. Cannon, 41 Md. 466; also, Taylor v. Henry, 48 Md. 550; Brown v. Brown, 23 Barb. 565; Roman Catholic Asylum v. Strain, 2 Bradf. 34; Sheegog v. Perkins, 4 Baxter, 273.

Whether a gift of a savings bank book, by delivery, is valid as a *donatio causa mortis*, Beak v. Beak, L. R. (13 Eq.) 489; McGonnell v. Murray, 3 Irish Eq. 460; Ashbrook v. Ryon, 2 Bush, 228; Case v. Denison, 9 R. I. 88; French v. Raymond, 39 Vt. 623; Tillinghast v. Wheaton, 8 R. I. 536; Sheedy v. Roach, 124 Mass. 472; Brooks v. Brooks, 12 S. C. 422; Fiero v. Fiero, 2 Hun, 600; Pierce v. Boston Sav. Bank, 129 Mass. 425; Conser v. Snowden, 54 Md. 175; or, as a gift *inter vivos*, Camp's Appeal, 38 Conn. 88; Hill v. Stevenson, 63 Me. 364; 58 Me. 499; Penfield v. Thayer, 2 E. D. Smith, 305; Curry v. Powers, 70 N. Y. 212; Davis v. Ney, 125 Mass. 500.

See, further, 1 White & Tudor's Lead. Cas. in Eq. *905.

JOHN H. STEWART.

Trenton, N. J.

WEEKLY DIGEST OF RECENT CASES.

APPEAL—FINAL JUDGMENT.

What constitutes a final judgment from which an appeal will lie in a criminal case. *Pennington v. State, Tex. Ct. App., Dec.* 10, 1881.

ATTORNEY AND CLIENT—QUANTUM OF COMPENSATION.

A, a lawyer, took a small retainer, and agreed with his client that he should have half the amount recovered. *Held*, that as, independent of any contract for contingent fees, the evidence showed that the amount claimed was no more than a reasonable compensation for the services performed, he could recover. *Youngman v. Miller, S. C. Pa., Oct.* 3, 1881.

CONVEYANCE—SUFFICIENCY TO PASS TITLE.

A deed of real estate executed, witnessed and delivered, is effectual to pass title, though not lawfully acknowledged or recorded. *Harrison v. McWhirter, S. C. Neb., Nov.* 12, 1881.

CORPORATION—ULTRA VIRES—SUBORDINATE OFFICERS.

Raising money by overdraft of a company's bank account by checks drawn by subordinate officers in the manner accustomed for a long time, without objection from the board of directors in whom rests the power of controlling the manner of transacting their business, can not, in a suit by the bank for the amount of the overdraft, be held to be *ultra vires*. *Mahoney Mining Co. v. Bank, U. S. S. C., Oct. T.*, 1881.

CRIMINAL LAW—EVIDENCE.

Presumptions which arise upon the possession of property shown to be recently stolen. *Williams v. State, Tex. Ct. App., Dec.* 10, 1881; *State v. Richart, S. C. Iowa, Dec.* 8, 1881.

CRIMINAL LAW—MALICIOUS INJURY TO PERSON.

The prisoner was the first, or almost the first, to leave the gallery of a theater at the close of the performance, and ran down the stairs and wilfully put out the gas, and placed an iron bar across the doorway. This caused a panic among the persons when leaving the gallery, and several of them were seriously injured through the pressure of the crowd. *Held*, that the prisoner was properly convicted of unlawfully and maliciously doing and inflicting grievous bodily harm within the meaning of 24 & 25 Vict. c. 100, sec. 17. *Reg. v. Martin, Eng. High. Ct., Cr. Cas. Res., Dec.* 10, 1881.

ELECTION—IRREGULARITIES IN THE CONDUCT OF.

Mere irregularities in the conduct of an election and the counting of the votes, not proceeding from wrongful intent, which do not deprive any voter of his vote, nor change the result, will not justify the rejection of the vote of the entire precinct in which they occurred. *Hoage v. Linn, S. C. Ill., Sept.* 30, 1881 (100 *Ill.* 397).

EVIDENCE—CONTEMPORANEOUS WRITTEN AGREEMENTS.

All contemporaneous written agreements between the same parties, and in relation to the same subject matter, are to be taken together, and construed as one instrument for the purpose of determining the character of the transaction, and the intention of the parties. *Gillman v. Henry, S. C. Wis., Nov.* 26, 1881.

EVIDENCE—FALSE TESTIMONY — FALSUS IN UNO, ETC.

The maxim *falsus in uno falsus in omnibus*, is applied only where the witness willfully and knowingly gives false testimony. *People v. Soto, S. C. Cal., Sept.*21, 1881.

HUSBAND AND WIFE.

Sufficiency of consideration necessary to the validity of a deed from husband to wife as against husband's creditors. *Fisher v. Shelver, S. C., Wis. Nov.* 22, 1881.

INSURANCE—FIRE POLICY—FORFEITURE — CONDITIONS OF POLICY.

The use of a portable steam engine for threshing grain within thirty feet of a barn, in consequence of an explosion of which the barn is destroyed by fire, will not work a forfeiture of the policy under a clause forbidding the insuring of any building "situated within fifty yards of any forges, furnaces, * * * * or in general any mills, factories or machineries driven by steam-power." *Farmers' Mut. Ins. Co. v. Moyer, S. C. Pa., April*, 1881.

JURY TRIAL—COMPETENCY OF JUROR.

A fixed opinion, no matter how acquired, of the guilt of the prisoner, is sufficient to render a juror incompetent. *Allison v. Commonwealth, S. C. Pa., Nov.* 14, 1881.

LIMITATIONS—NEW PROMISE TO REMOVE THE BAR OF THE STATUTE.

To remove the bar of the statute of limitations, it is not necessary that a clear, explicit promise to pay be shown; but there must be an unambiguous recognition of an existing debt, so distinct and expressive as to preclude hesitation as to the debtor's meaning, and as to the particular debt to which it applies, and it must be consistent with a promise to pay. The suit is not on a new promise, but on the original contract; for the statute does not destroy the debt—it only takes away the right of action. *Wesner v. Stein, S. C. Pa., May* 2, 1881.

MARRIED WOMAN — SEPARATE ESTATE — SURETY FOR HUSBAND—STATUTE OF LIMITATIONS.

The separate property of the wife, mortgaged to secure a debt of the husband, stands in the attitude and has all the advantages of an individual third party surety; and the statute of limitations runs in favor of the wife from the date of the maturity of the note thus secured, notwithstanding that the debt as against the husband is kept alive by proceedings in bankruptcy. *Wofford v. Unger, S. C. Tex., Dec.* 13, 1881.

NEGOTIABLE PAPER—ACCOMMODATION MAKER.

An accommodation maker of a note receives nothing for his signature, and the party accommodated parts with nothing, and the admitted facts show that he is not such maker. *Gillman v. Henry, S. C. Wis., Nov.* 26, 1881.

PARTNERSHIP—TERMINATION BY TERMS OF ARTICLES—DEATH OF MEMBER.

Where articles of co-partnership provide that the death of one of the partners shall not terminate the partnership, but the same shall continue, the executor of the deceased partner to act for him, the general estate of a deceased partner is bound by the obligations of the partnership contracted in the regular course of business, and a pledge of the assets of the estate for firm debts, is valid. *Blodgett v. American Nat. Bank, S. C. Errors, Conn.*

SPECIFIC PERFORMANCE—CONTRACT FOR LEASE—UNCERTAINTY.

Specific performance will not be enforced of an agreement to grant a lease where no time for the commencement of the lease is fixed by the agreement, and the mere fact that the agreement itself is dated, does not fix the time for such commencement. *Marshall v. Buridge, Eng. Ct. App., Nov.* 19, 1881.

STATUTE OF FRAUDS—GUARANTY ON NOTE OF ANOTHER.

Where a person is indebted to another, and in payment thereof transfers to such creditor the note of a third party as property with his own guaranty upon it, such guaranty is not a special promise to answer for the debt, default or miscarriage of another person, within the meaning of the statute, but simply a method of paying or guaranteeing the payment of his own debt, and hence is not required to express the consideration. *Eagle Mowing and Reaping Machine Co. v. Shattuck, S. C. Wis., Nov.* 22, 1881.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]*

QUERIES.

1. If the tenant, by the curtesy, fraudulently colludes with strangers to deprive his children, who hold the ulterior estate in vested remainder, and by that fraudulent collusion succeeds in disposing of a part of the estate, and converts the other part in an estate in himself, for life, with remainder to his children (the difference between the estate by the curtesy and the life estate being that, under the curtesy, he is liable for accidental waste, and, under the later, he is liable for negligent waste only. Upon setting aside of the whole transaction on the ground of fraud, can the court also adjudge a forfeiture of the tenancy by the curtesy, and thereby oust innnocent purchasers of the property descended from the wife, before the death of the tenant by curtesy?

QUERIES ANSWERED.

Query 62. [13 Cent. L. J. 498.] A negro man and woman, A and B, being slaves, were, by consent of their masters, and according to the custom then prevailing among that race, married, and lived together until separated by the will of their masters. From this marriage two children were born. After emancipation A married C and died intestate, leaving no children by C. Can the children by first marriage claim an interest in A's estate as against C, the law in Mississippi being that, on the death of a husband without legitimate children, his wife inherits all his estate? The question is simply, Are the children of A and B bastards?

Coffeeville, Miss. R. R.

Answer 1. The children of A and B would not be bastards in Georgia. The acts of 1865–1866, pp. 239, 240, and acts of 1866, pp. 156, 157, attempt to regulate this question, and is as follows, as codified, sec. 1669: "Every colored child born before the 9th day of March, 1866, is hereby declared to be the legitimate child of his mother; but such child is the legitimate child of his colored father only when born within what was regarded as a state of wedlock; or when the parents were living together as husband and wife." Legislation in some of the Southern States was necessary to settle property rights. A recent case was thus settled under above acts: A married B in slavery times, *per verba de præsenti*, no license, no minister, or magistrate, each agreeing to consider themselves husband and wife. A boy was born, and then A, the father died. Right to inherit. 40 Ga. 339. After 9th day of March, 1866, the mother, B, again married by regular license, a colored parson performing the ceremony. By this second marriage another child was born, and she, B, died. Now we have two children claiming her property, a valuable house and lot being assets. The husband, under Georgia statute, was, of course, entitled to one-third; but two-thirds was to go in bulk to one or the other of these boys, or divided equally between them. The law gave each his one-third. The boy born a slave was on equal footing with the one born a freeman. The case is not reported, but these are the salient points. Does it answer "R. R.?" I think so; for A and B, by master's consent, and custom also, married. Two children being born, they were still A's children, with a new mother, C. Upon A's death, the Georgia reasons being good in Mississippi, they were his legitimate children, and under Mississippi law, C, his widow, could not inherit. Our Georgia statute may materially change the common law, however. See 41 Ga. 220; 45 Ga. 558. R. D. W., JR.

Savannah, Ga.

Answer 2. The question raised is in many localities a mooted one; but as far as the law goes, it is well settled in Massachusetts, that no parties can marry themselves; the fact of a man and woman voluntarily living and cohabiting together in good faith as man and wife, does not make them so in this State, although in New York the courts have gone so far as to decide that parties living together as above were man and wife to all intents and purposes, and their children inherited their progerty as if a valid marriage had occurred. In Massachusetts, however, the law is different, and has been definitely settled; here, in all cases, persons must go before a magistrate, or a minister, that he may lend his official aid to the contract; and in addition to that, the parties must enter their intention of marriage with the town clerk, that a record may be kept according to General Statutes of Mass., chap. 106. The old "common law," that parties could alone, and unaided officially, marry, was never adopted in this State. 7 Mass. 48, 53. The nearest case we have in our reports to the one you refer to in your "Query," is the case of Flora, found in the 29 Quincy Rep. (Mass.) 1758. The defendant was indicted under Prov. St. of 1696, for murdering her child, and the jury, by a special vereict, found "that the said Flora is, and from her nativity has been, a negro slave; that she was never married according to any of the forms prescribed by the laws of this land, but that the person supposed to be the father of the said child, was also a slave, and had kept her company with her master's consent for above a year and a half before that she was delivered of the female child," etc. And the jury found the defendant guilty, or not guilty, according as the court were of the opinion whether the child was or was not a bastard,—the statute under which the indictment was laid making it penal only in case the child was a bastard,—and the court found the defendant not guilty (Flora's Case, Rec. 1758, Fol. 295), there being some doubt as to the legality of any marriage between Flora and her slave companion, and they gave the prisoner the benefit of the doubt. The whole question here has been determined by statute, and the only exception to the necessity of a public record and the assistance of a magistrate, or a clergyman, is in the case of people belonging to the "Friends or Quakers," who may marry according to the rites and usages of their Societies; these Societies are well organized and distinct bodies of people, and not only their wishes were respected, but it was also deemed that marriages so solemnized would work no public harm. But the whole matter has been admirably treated by Gray, C. J., in 127 Mass. 459, in the case of Commonwealth v. Munson, where the decision is that "a ceremony, performed by a man and woman in good faith as a marriage rite, no third person participating, and no magistrate or minister, nor any person believed to be such, being present, and neither party being a Friend or a Quaker, does not constitute a valid marriage under the laws of this commonwealth." So, here at least, I am of the opinion, or rather like circumstances happening here. A and B would not be man and wife, but A and C would be, and the two children had by B (by A) would inherit only from B; and the children of C by A would inherit from A, they alone being legitimate. N. P. FRYE.

Lawrence, Mass.